Filed 10/20/20 P. v. Pearle-Van Pelz CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BERNARD RAYMOND PEARLE-VAN PELZ, Defendant and Appellant.	G058244 (Super. Ct. No. 98CF0529) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Kimberly Meninger, Judge. Appeal dismissed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Daniel Rogers, Adrianne S. Denault and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

This appeal must be dismissed. The order requiring briefing of the question of sufficiency of the evidence in appellant's original case was improvidently issued. Res judicata prohibits review of the issue in this proceeding.

FACTS

Appellant was convicted in 1999 of conspiracy to commit murder and solicitation to commit murder. The court sentenced him to 25 years to life. He appealed his convictions, and they were affirmed.

In 2019, he petitioned the Orange County Superior Court to vacate his convictions under Penal Code section 1170.95. His petition was denied because it did not set forth a prima facie case for relief, defendant having not been convicted of the crimes or on the theories addressed in Penal Code section 1170.95.

Appellant appealed that order to this court. We appointed counsel for him, but counsel was unable to find an arguable issue for appellant and so informed this court. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant filed his own supplemental brief; that brief did not address the issues under Penal Code section 1170.95, but instead raised issues about his underlying conviction. This court requested additional briefing on those issues.

DISCUSSION

We now realize further briefing was unnecessary and futile and apologize to both sides for requesting it. The fact appellant had previously appealed his conviction and had it affirmed eluded us.

Res judicata bars reconsideration of the matters raised in that appeal decades later. The doctrine of res judicata applies to criminal cases. (*People v. Beltran* (1949) 94 Cal.App.2d 197, 203.) It applies independently of double jeopardy. (*People v. Gephart* (1979) 93 Cal.App.3d 989, 998, citing *People v. Beltran, supra,* 94 Cal.App.2d at p. 202.)

Regarding the scope of res judicata, *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202 sets it out very simply, "[T]he rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." (Italics omitted.) In other words, "[i]f the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged." (*Ibid*.)

Appellant's counsel, to his credit, gamely argues our affirmance of appellant's conspiracy conviction did not reach issues that should have been argued. He questions the adequacy of original appellate counsel and insists res judicata does not apply here because, "Res judicata precludes the relitigation of a cause of action only if (1) the decision in the prior proceeding is final and on the merits; (2) the present action is on the same cause of action as the prior proceeding; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding." (Citing *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82.)

Unfortunately, counsel apparently stopped reading before he finished that paragraph. The next sentence goes on to say, "Res judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that could have been litigated in that proceeding." (*Zevnik v. Superior Court, supra,* 159 Cal.App.4th at p. 82.)

Any additional problems with the conspiracy charge against appellant obviously could have been litigated at the time of the first appeal. The facts recited in that opinion leave little doubt the argument now advanced by appellant about overt acts

would have been bootless even if we could consider it, but the unavoidable fact is the issue could have been raised at that time and res judicata bars it now.[1]

Appellant's assertion that "res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed'" (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902) is not a convincing argument in this case. There is nothing here to indicate any extraordinary factual situation or suggest injustice.

The unfortunate fact of the matter is that the author simply did not see the prior opinion in this matter and caused the court to issue an improvident order. That mistake must now be remedied by dismissal of the present appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.

[1] As to the adequacy of original appellate counsel, there is nothing in the record to support an inadequacy of counsel argument here; while the facts recited in the original opinion clearly indicate the argument now advanced would fail, its consideration would certainly require a fuller record.